

The Board reviewed the brief submitted by the Houghtellings, heard the sworn testimony of witnesses, reviewed the exhibits and listened to the closing arguments of the parties. The Board viewed the property as an aid to understanding the evidence. Based on its review, the Board makes these:

FINDINGS OF FACT

I

The Houghtellings reside in Allyn, on Case Inlet in Puget Sound. They purchased their residence in 1976. The shoreline in front of their property, and that of neighbors to the north is a non-natural shoreline, having been bulkheaded and filled, beyond the ordinary high water mark, prior to the passage of the Shoreline Management Act ("SMA").

II

Jennings' property, abutting Houghtellings on the south, has a low concrete bulkhead which is at the ordinary high water mark. This bulkhead was placed in 1979-80. Its shoreline is more natural than that of the Houghtellings. Jennings and his wife had a partial view of the waters of Case Inlet, over the Houghtelling's old garage and guest house, from their second story deck and living room.

III

Mrs. Houghtelling submitted a building permit application to the County on March 3, 1991, for a "garage and storage" The work described in the permit was "to take walls and roof down and put up new walls and roof - for garage and storage" The application contained a plot plan drawn by Mrs. Houghtelling, and several sketches of the building, including one which represented a cross-section of the building. The floor dimensions of the garage were listed as 30 feet by 32 feet. Although there is no sketch or diagram which shows the total height of the building, the height can be derived from the cross-sectional sketch. The height at

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1 the west end is approximately 17' 6", at the east end it is 19' 6" above the ground elevation.
2 The difference is due to the fact that the land slopes towards the water.
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4 IV

5 The old garage was a one story building. The new garage contains a second-story loft,
6 and is about four feet higher than the old garage. The new garage contains space for an
7 automobile, a RV vehicle, and an open-ended carport on the south side. The loft is above the
8 automobile parking area, and contains windows on the north side. It is currently used as a
9 weight room by the Houghtellings' son. Although the plans do not indicate it, the plumbing
10 has been roughed into the garage, for a toilet or sink.

11 V

12 Don Fawver, County building inspector, made some notations on the application, at a
13 March 19, 1991 meeting with Mrs. Houghtelling in Belfair. Among these is the addition of
14 the word "new" to the description of the work. Mrs. Houghtelling received a phone call from
15 Steve Nichols, from the County Planning Department, on March 26, 1991. Mr. Nichols asked
16 her for the distance from the shoreline to the garage. She took measurements with her son
17 and relayed them to Mr. Nichols. The permit was initially approved by the County Planning
18 Department, on March 26, 1991. Mr. Fawver, on April 11, 1991, determined that the
19 building was a total replacement. At this time he wrote Tamu Griffey, of the Building
20 Department, advising her of this fact. Ms. Griffey called the Planning Department, after
21 receiving Mr. Fawver's note. She then wrote to Mr. Fawver, the following note:

22 Don. Planning says this is OK even if it is a 100% replacement as long as it does not
23 differ in size or location of existing. Mrs. Houghtelling wants to know if she needs
24 demolition permit & also if the plans are sufficient, or if they need more detail. Also,
25 any possibility it can be ready for issue at the Belfair Office on Tues 4-16-91? I'm
26 suppose [sic] to call her 4-15-91 w/ info.

1 Mr. Fawver approved the permit on April 15, 1991, He inspected the building at various
2 times during its construction. He is no longer working with the County. When completed, it
3 was four feet from the Houghtellings' guest house, at the roof line, despite the fact that the
4 application diagram showed a five foot separation.
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6 VI

7 Steve Nichols wrote Mrs. Houghtelling a letter, dated: October 15, 1991, explaining
8 that the building permit was issued in error, because the structure was inconsistent with
9 shoreline regulations contained in the Mason County Shoreline Master Program ("MCSMP")
10 Mr. Nichols requested the Mrs. Houghtelling contact the County Department of Community
11 Development within 10 days to discuss submittal of an after-the-fact shoreline variance permit.

12 VII

13 Houghtellings applied for a shoreline variance, on forms prepared by the County. .
14 Sometime in December 1991, they entered into a "Standstill Agreement" with the County.
15 Under the terms of this agreement, the Houghtellings agreed to cooperate with the County in
16 applying for a shoreline variance permit, provided that their cooperation was not construed to
17 waive or release any claim they may have against the County or others, arising out of the
18 permitting process surrounding their garage project.

19 VIII

20 The Houghtelling's garage projects beyond an imaginary line between the roof lines of
21 the adjacent residences, within 150 of either side of the structure. It is impossible to
22 determine from the evidence, precisely how many feet the Houghtellings' garage is beyond
23 this common setback line.
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2 IX

3 The Houghtellings contended that moving the garage back behind the common setback
4 line would make ingress and egress from the property unsafe. They based this on the fact that
5 the property is on a curve in the highway, and that there has been a car accident on the
6 property, in the last year. This evidence is belied by the aerial photographs which show that
7 Jennings property (with a garage much closer to the road than the Houghtellings' structure), is
8 closer to the nearest curve in the highway (which is to the east of the properties), than is
9 Houghtellings' property. The evidence reveals that there is more than adequate space on
10 Houghtellings' property to move the garage behind the common setback line, and still have
11 plenty of space to turn around their vehicles. before entering the highway.

12 X

13 Houghtellings also contend that moving the garage closer to the highway, will bring it
14 impermissibly close to the well. The evidence reveals that the Houghtellings' house is within a
15 few feet of the well. They did not cite any law prohibiting the moving of the garage slightly
16 closer to the well.

17 XI

18 The County Shoreline Advisory Board reviewed the shoreline variance application, and
19 on May 26, 1992 voted to deny the permit. The County Commissioners held a public hearing
20 on the application on June 2, 1992. They heard testimony on the application on that date, and
21 as well on: July 14 and August 4, 1992. On September 8, 1992, the County Commissioners
22 voted to deny the variance permit. On September 14, 1992, the County Commissioners
23 adopted findings and conclusions. On October 27, 1992, the Houghtellings brought before the
24 County Commissioners an appeal of the County Department of Community Development
25 Administrator's decision that a variance was required. After hearing testimony, the County
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1 Commissioners, on November 17, 1992. voted to affirm the findings and conclusions prepared
2 by the Administrator.
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4 XII

5 The Houghtellings filed a request for review of the County's denial of its shoreline
6 variance application, on October 26, 1992, with the Board. Ecology, on November 4, 1992,
7 wrote to the County, stating that it believed all issues pertaining to the Houghtelling's
8 shoreline variance request, were before the Shorelines Hearings Board. Ecology also
9 supported the decision of the County to require the variance, and to apply the setback formula
10 based on the common setback line, as opposed to the use of a proportionate setback, which is
11 applicable to areas where there is "a pronounced curve shoreline or point". Ecology reasoned
12 that the later formula applies to "natural points or curves". In this case, Ecology explained,
13 the pronounced point or curve results from a fill beyond the ordinary high water mark.
14 Ecology concluded, that to apply the formula to this case, would "be rewarding a property
15 owner for having filled beyond the ordinary high water mark and penalizing those properties
16 that maintained a more natural shoreline"

17 XIII

18 Any Conclusion of Law deemed to be a Finding of Fact is hereby adopted as such.
19 From these Findings of Fact, the Board issues these:

20 CONCLUSIONS OF LAW

21 I

22 The Board has jurisdiction over the shoreline issues. RCW 90.58.180.

23 II

24 The Houghtellings, having appealed the County's denial of a shoreline variance, bears
25 the burden of proof before the Board. RCW 90.58.140(7).
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27 FINAL FINDINGS OF FACT,
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III

The Houghtellings argue that the County has no authority to require after-the-fact shoreline permits. This was not included as an issue in the Pre-Hearing Order, and therefore need not be
Transportation, SHB No. 86-34 (1988); Tailfin, Inc. v Skagit County and Department of Ecology, SHB No. 86-29 (1987). Nevertheless, we do consider it and believe that the SMA does not preclude local government from issuing after-the-fact shoreline permits. Such a process, allows the party who unlawfully constructed a development without a shoreline permit, an opportunity to demonstrate that its project conforms to the SMA and to the county master program. Having entered that process and receiving a denial, appellants want to now claim that the process, which provided them an opportunity to prove that the structure conforms to the SMA and the MCSMP, was illegal. This argument must fail. The alternative, would be a conclusion that the mere fact of the illegal construction compels its abatement. The Board has previously declined to adopt that position. Ashbaugh v. Town of Hunts Point, SHB No 82-54 (1983). Given the facts before us, we are not inclined to adopt it here.

IV

The SMA makes no distinction between review, by the Board, of before and after-the-fact permits. RCW 90.58.180(1)

V

The Houghtellings, without utilizing the terminology of equitable estoppel, argue that the County's issuance of a building permit for the garage, estops it from requiring a shoreline variance permit from the Houghtellings. We disagree.

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VI

We recognize that the Houghtellings did not deliberately mislead the County into issuing them a building permit. Their treatment by the County Building Department was far from exemplary. The County should have better procedures in place for coordination between its Building and Community Development Departments, when dealing with permit applicants. Were it within the Board's power, it would consider directing the County to move the garage behind the common setback line at its own expense. However, this Board does not have jurisdiction over how the County implements its Building Code; nor do we believe that the doctrine of equitable estoppel applies.

VII

Equitable estoppel can be applied against a municipality, such as the County, acting in its governmental capacity, only when "the exercise of its governmental powers will not be impaired thereby". Finch v. Matthews, 74 Wn.2d 161, 175, 443 P.2d 883 (1968). The doctrine is not favored, and requires that every element be proved with clear, cogent and convincing evidence. Robinson v. City of Seattle, 119 Wn.2d 34, 82, 830 P.2d 318 (1992), reconsideration denied; Mercer v. State, 48 Wn. App. 496, 500, 739 P.2d 703 (1987).

VIII

The doctrine of equitable estoppel will not be applied against a governmental body, where the act giving rise to the alleged reliance was ultra vires or void. State v. Adams, 197 Wn.2d 611, 615, 732 P.2d 149 (1987); Choi v. Fife, 60 Wn. App. 458, 464-65, 803 P.2d 1330 (1991). The latter case is particularly on point. There, the Court rejected application of the doctrine against a municipality, where it was contended that the Mayor of Fife, in a letter, allowed the continuation of a nonconforming use, beyond the time limits set forth in the local ordinance. The Court concluded that the Fife City Council has the exclusive authority to grant

1 such extensions. The Mayor's actions were ultra vires. Likewise, here the Building
2 Department and the Community Development Department, lacked authority to grant a
3 shoreline variance permit. That authority lies exclusively with the County Commissioners,
4 under the MCSMP. MCSMP, 7.12.040(1)(b). The Houghtellings have failed to prove that
5 the County Commissioners ever approved the shoreline variance.
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7 IX

8 The purpose of the SMA and the MCSMP is to protect the public health, safety and
9 welfare, and to provide for the management of the shorelines of the state. The SMA and the
10 MCSMP are designed to protect the rights of the public as well as those of property owners in
11 the shorelines. RCW 90.58.020. Estopping the County from enforcing the SMA and its
12 master program would prevent the County from accomplishing these important governmental
13 purposes. See Massey v. Island County, SHB No. 80-3, at 8-9 (1981) (holding County not
14 estopped from contending that an area proposed to be filled was subject to the SMA and the
15 local master program).

16 X

17 The MCSMP provides for a default setback line for structures, from the ordinary high
18 water mark, of 15 feet. MCSMP. 7.16.080. Use Regulation 9(a). The master program allows
19 for increasing or decreasing that setback in cases where the shoreline slope is greater than
20 40%; in areas of severe instability; or where the average of the two adjacent structures, within
21 150 feet of a proposed structure, is greater than the setback for that environment. Id. In the
22 latter event, there are two methods available for determining the setback: 1) the common
23 setback line, and 2) the proportionate setback line.
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XI

The Houghtellings argue first that no variance is required, because the Administrator has the discretion to increase, or decrease the setback line. Although the MCSMP is not a model of clarity in this regard, the basic rule applies that the SMA is to be liberally construed on behalf of its purposes and objectives. One of the primary objectives of the SMA is to protect the aesthetics of the shorelines. RCW 90.58.020. This means providing protection of both private and public views of the shoreline. Ecology v. Pacesetter, 89 Wn.2d 203, 208, 571 P.2d 196 (1977). The purpose of the MCSMP setback provisions is consistent with this purpose. That purpose is gleaned from section 7.16.080, Policy 9, which directs, in pertinent part:

Residential structures should be located to minimize obstruction of views of the water from upland areas. The intent of this policy is to encourage the retention of views in and through new residential developments.

XII

Whatever discretion the Administrator had was limited to fulfilling this objective. The County Commissioners determined that "the design and location of the project does cause adverse effects on the view of the neighbor". Local government has the primary responsibility to administer the regulatory program of the SMA. RCW 90.58.050. The evidence reveals that the County has consistently applied the common setback line according to the formula established in the MCSMP. We believe they properly have interpreted the SMA and the MCSMP, as they apply to the Houghtellings' project.

XIII

Section 7.28.020(4) of the MCSMP provides that a shoreline variance can not be issued unless:

the variance authorized does not constitute a grant of special privilege not enjoyed by the other properties in the area, and will be the minimum necessary to afford relief;

1 The Houghtellings have failed to prove that their proposal complies with this criterion. On the
2 contrary, the evidence leads to the conclusion that there is sufficient room for the
3 Houghtellings to move their garage behind the shoreline setback line, thus obviating the need
4 for a variance.
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6 XIV

7 Any Finding of Fact deemed to be a Conclusion of Law is hereby adopted as such.
8 From the foregoing, the Board issues this:
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ORDER

The County's decision to deny the Houghtellings a variance is affirmed.

DONE this 3rd day of November, 1993.

SHORELINES HEARINGS BOARD


ROBERT V. JENSEN, Presiding Officer


RICHARD C. KELLEY, Member


DAVE WOLFENBARGER, Member


O'DEAN WILLIAMSON, Member

S92-50F